A **S & S POWER SWITCHGEAR LTD**

v.

TOPRANK CORPORATION SDN BHD

B COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZAINUN ALI JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-243-03]
C 24 FEBRUARY 2010

CIVIL PROCEDURE: *Summary judgment - Claim for moneys for goods sold and delivered - Parties acknowledged sum due and payable in account stated - Whether learned judge erred in dismissing application for summary*
D *judgment*

CONTRACT: *Account stated - Evidence of debt - Clear case that sum claimed due and payable - Whether learned judge erred in dismissing application for summary judgment*

E The Deputy Registrar dismissed the application by the appellant against the respondent herein for summary judgment in the sum of RM2,494,907.02 together with interest for goods sold and delivered by the appellant to the respondent. The appellant's appeal to the High Court was dismissed. The appellant now appealed before the
F Court of Appeal. The facts showed that the appellant was an Indian manufacturing company of equipment components and parts for use in the generation, transmission and distribution of electricity. The respondent ordered goods from the appellant in the sum of RM8,807,640 by reason of two contracts it (the respondent) had
G procured from Tenaga Nasional Berhad ('TNB'). The respondent had reasonable time to inspect and reject the goods after delivery and in fact later placed a further order in the sum of RM956,110. The appellant issued to the respondent the corresponding invoices as and when the goods were dispatched. The goods supplied by the
H appellant were assembled and processed by the respondent and the respondent supplied, installed, tested and commissioned the goods for TNB, the end consumer. TNB had not rejected the goods to date and had paid the respondent in full for the goods supplied. However, the respondent only made part payment to the appellant
I and did not pay the full amount on the ground that the goods

supplied were defective. The parties, in fact, had agreed on the amount owing by the respondent to the appellant after two meetings held between them in Chennai, India. The amount due and payable were recorded in an account stated which was approved and signed by the representatives of both parties. The amount prayed for in the appellant's summary judgment application was less than what was agreed to by both parties in the account stated as deductions were made for the part payment and other debit notes raised by the respondent at the second meeting between the parties. The respondent argued that the requirements for the doctrine of account stated had not been met and that the appellant's reliance on the account stated was misconceived.

Held (dismissing the appeal on condition that order of High Court should be substituted)
Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) The law in respect of account stated is settled. An account stated is commonly called an admission of debt but is merely evidence of it (Blackburn J in *Re Laycock v. Pickles & Anor*). (paras 13 & 14)

(2) Both parties tried to work out to reconcile their statements of account which led to two meetings in Chennai, India. Both parties sent their appropriate representatives to hold discussions and were able to reconcile their statements of account and came up with an agreed account stated, in spite of which the respondent chose not to pay when demanded to do so. (para 17)

(3) There was no privity of contract between the appellant and TNB. The respondent supplied the goods directly to TNB, installing, testing and commissioning the goods according to TNB's requirements. The appellant was never involved in the said activities. (para 18)

(4) The account stated was duly signed by the representatives of both parties. The averments of the respondent were inconsistent with contemporaneous documentary evidence of the account stated. Both parties were bound it. They could not deny the very existence of evidence they had signed. (para 19)

(5) The learned judge confirmed that the respondent had not paid the appellant although the respondent admitted receiving the payments from TNB. This was a clear case where the respondent truly owed the appellant the sum claimed. There was strong evidence that the sum claimed was due and payable. Since the respondent had received the payment from TNB, the appellant was entitled to full payment for the goods sold and delivered. (paras 22 & 24)

(6) This was a unique case. There was clear evidence that the parties agreed to reconcile the debt by having discussions over the matter and subsequently agreeing to a sum payable, nonetheless, the learned High Court judge felt that summary judgment could not be granted to the appellant. As such, the order of the High Court should be substituted with the following: "The respondent is allowed to defend this action upon payment into the High Court within 30 days hereof a sum of RM2,494,907.02 failing which final judgment shall be entered against the respondent for the sum of RM2,494,907.02 together with interest thereon at a rate of 8% per annum from the date of final judgment to the date of realisation." (paras 25 & 26)

[No order as to costs and deposit of appeal refunded to appellant.]

Bahasa Malaysia *Translation Of Headnotes*

Timbalan Pendaftar di sini telah menolak permohonan perayu untuk penghakiman terus bagi jumlah RM2,494,907.02 beserta dengan faedah berkaitan barangan yang dikatakan dijual dan dihantarserah oleh perayu kepada responden. Rayuan perayu ke Mahkamah Tinggi telah ditolak dan perayu kini merayu ke Mahkamah Rayuan. Fakta menunjukkan bahawa perayu adalah sebuah syarikat pengeluar barangan dari India yang mengeluarkan perkakas dan komponen untuk digunakan dalam penghasilan, pengaliran dan pengedaran elektrik. Ekoran dari dua kontrak yang diperolehi responden dari Tenaga Nasional Berhad ('TNB'), responden telah memesan barangan dari perayu bernilai RM8,807,640. Responden mempunyai masa yang munasabah untuk memeriksa dan menolak barangan selepas ianya dihantarserah, tetapi tidak berbuat demikian. Responden malah telah kemudian membuat beberapa pesanan tambahan bagi barangan dari perayu bernilai RM956,110. Perayu pula telah menghantar inbois-inbois yang berkaitan kepada

responden sebaik sahaja barangan dihantar. Barangan yang dibekalkan oleh perayu telah dikumpul dan diproses oleh responden, di mana responden kemudian akan membekalkan, memasang, menguji dan mentauliahkannya untuk TNB, penggunanya yang sebenar. Sehingga kini, TNB tidak pernah menolak barangan dan telah membayar sepenuhnya harga barangan kepada responden. Responden, bagaimanapun, hanya membuat bayaran sebahagian kepada perayu dan enggan membuat bayaran sepenuhnya atas alasan barangan yang dibekalkan perayu adalah cacat. Sebenarnya, ekoran dari dua perjumpaan yang diadakan di antara pihak-pihak di Chennai, India, pihak-pihak telah pun bersetuju mengenai jumlah yang masih terhutang oleh responden. Jumlah yang terhutang dan perlu dibayar tersebut juga telah dicatit di dalam satu akaun dinyatakan yang ditandatangani dan diluluskan oleh wakil kedua-dua pihak. Sebenarnya juga, jumlah yang dituntut oleh perayu dalam permohonan penghakiman terusnya adalah lebih rendah dari yang dipersetujui oleh kedua-dua pihak di dalam akaun dinyatakan, setelah tolakan-tolakan dibuat bagi pembayaran sebahagian dan lain-lain nota debit yang dibangkitkan oleh responden di perjumpaan yang kedua. Responden bagaimanapun berhujah bahawa syarat-syarat doktrin akaun dinyatakan telah tidak dipatuhi dan bahawa kebergantungan perayu terhadap akaun dinyatakan adalah tidak berasas.

Diputuskan (menolak rayuan dengan syarat bahawa perintah Mahkamah Tinggi hendaklah diganti)

Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang mengenai akaun dinyatakan adalah sudah mantap. Suatu akaun dinyatakan biasanya dipanggil pengakuan keberhutangan walaupun ia hanyalah bukti mengenainya. (Blackburn J in *Re Laycock v. Pickles & Anor*).

(2) Kedua-dua pihak telah cuba untuk bertolak ansur mengenai akaun-akaun dinyatakan yang membawa mereka kepada dua perundingan di Chennai, India. Kedua-dua pihak telah menghantar wakil-wakil mereka untuk mengadakan perbincangan dan telah berjaya mengkompromikan penyata-penyata akaun mereka dan sekaligus mencetuskan akaun dinyatakan yang dipersetujui. Walaupun begitu, responden memilih untuk tidak membayar kepada perayu walaupun tuntutan terhadapnya telah dibuat.

(3) Tidak wujud priviti kontrak di antara perayu dan TNB. Responden telah membekalkan barangan secara terus kepada TNB, dan telah memasang, menguji serta mentauliahkan barangan menurut keperluan TNB. Perayu tidak terlibat langsung dalam aktiviti-aktiviti tersebut.

(4) Akaun dinyatakan telah ditandatangani dengan teraturnya oleh wakil-wakil kedua-dua pihak. Maka itu, hujah-hujah responden adalah tidak konsisten dengan keterangan-keterangan dokumen kontemporari mengenai akaun dinyatakan. Bagaimanapun mereka adalah terikat dengan keterangan dokumen tersebut. Pihak-pihak tidak boleh menafikan kewujudan keterangan yang mereka sendiri memeterainya.

(5) Yang arif hakim mengesahkan bahawa responden telah tidak membayar perayu walaupun setelah mereka menerima bayaran dari TNB. Ini adalah satu kes yang jelas di mana responden sememangnya telah berhutang dengan perayu jumlah yang dituntut. Terdapat keterangan yang kukuh bahawa jumlah yang dituntut adalah terhutang dan kena dibayar. Oleh kerana responden telah menerima bayaran dari TNB, maka perayu berhak menerima bayaran sepenuhnya barangan yang telah dijual dan dihantarserah tersebut.

(6) Ini adalah satu kes yang unik. Terdapat keterangan yang jelas bahawa pihak-pihak telah bersetuju untuk berkompromi mengenai hutang dengan mengadakan perbincangan mengenai perkara tersebut dan kemudiannya bersetuju dengan jumlah yang perlu dibayar, namun, yang arif hakim Mahkamah Tinggi tetap merasakan bahawa penghakiman terus masih tidak boleh dibenarkan kepada perayu. Oleh itu, perintah Mahkamah Tinggi haruslah digantikan dengan perintah berikut: "responden dibenarkan membela tindakan ini setelah membayar kepada Mahkamah Tinggi dalam tempoh 30 hari dari hari ini sejumlah RM2,494,907.02 dan jika gagal berbuat demikian satu penghakiman muktamad akan dimasukkan terhadap responden untuk jumlah RM2,494,907.02 beserta dengan faedah pada kadar 8% setahun dari tarikh penghakiman muktamad hingga ke tarikh penyelesaian".

[Tiada perintah mengenai kos dan deposit rayuan dikembalikan kepada perayu.]

Case(s) referred to:
Re Laycock v. Pickles & Anor 4 B & S 497 ***(refd)***

For the appellant - Shahul H Amirudin (Sonia Anirudhan with him); M/s Zul Rafique & Partners
For the respondent - Alvin Tang (Faisal Moideen with him); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

Sulong Matjeraie JCA:

[1] This is the judgment of this court. This appeal was brought before us after the learned High Court Judge dismissed the appellant's appeal against the decision of the deputy registrar in refusing to grant the appellant's application for a summary judgment.

[2] The appellant is claiming for the sum of RM2,494,907.02 together with interest based on the following grounds:

(i) The balance of purchase price for goods sold and delivered by the appellant to the respondent; and

(ii) The account stated as evidenced by a written document dated 16 April 1999.

[3] Facts Of The Case

(a) The appellant is an Indian Company which manufactures equipment components and parts that are generally used in the generation, transmission and distribution of electricity, including switchgears (also known as a Vacuum Circuit Breaker or VCB). The function of a switchgear is to trip and disconnect the supply of electricity in the event of electrical fault, irregularities or over current, to prevent fire or an explosion;

(b) The respondent procured two contracts from Tenaga Nasional Berhad (TNB).

(c) The respondent ordered goods from the appellant by way of a purchase order dated 16 December 1994 for 1,140 sets of components to fabricate high voltage electric transmission switchgears at a purchase price of RM8,807,640.

A (d) The respondent was allowed reasonable time to inspect and if necessary to reject the goods and the terms of the purchase allowed the respondent a period of 90 days, and more often than not 150 days, from the date of delivery of the goods to make payment.

B (e) Some 15 month later, ie, on 16 March 1996, the respondent placed a further order with the appellant by way of a purchase order for 59 components of differing specifications for making switchgears at a price of RM956,110.

C (f) As and when the goods were dispatched, the appellant issued to the respondent the corresponding invoices for the goods shipped as well as for relevant services rendered in respect thereof.

(g) TNB was the end-consumer.

D (h) The goods supplied by the appellant were *assembled and processed by the respondent and the respondent would supply, install, test and commission the completed switchgears for TNB at the latter's high voltage electricity transmission lines and/or substations.*

E (i) TNB has not, to date, rejected the goods supplied and to date, TNB continues to use the switchgears.

(j) TNB has paid the respondent in full for the switchgears supplied.

F (k) Yet after receiving the full payment, the respondent alleged that the goods supplied by the appellant were defective.

(l) Respondent has yet to pay the appellant the full amount due and owing.

G

No Defence To The Appellant's Claim

[4] Notwithstanding that full payment had been received by the respondent from TNB and none of the goods supplied were rejected H and returned by TNB, the respondent had only made part payment for the goods. Even that part payment was only received long after receiving delivery of all the goods from the appellant. It is also useful to indicate that such part payment was made without any qualification whatsoever.

I

Account Stated

[5] It is not disputed by the parties hereto that on 22 March 1999 and 23 March 1999, authorised representatives of the appellant and the respondent met in Chennai, India to discuss accurately the amount due and payable by the respondent to the appellant. The appellant was represented by Mr. R Ravi Kula Chandran, its Senior Manager, Finance and Accounts while the respondent was represented by Ms Bee Choo Teh, their Group Accountant.

[6] During the said meeting the respondent wanted the appellant to consider certain debit notes allegedly raised by the respondent but had not been received by the appellant at the time of the meeting. It was then agreed that the respective representatives would return to Chennai the following month (April 1999) so that a final account can be agreed upon.

[7] On 16 April, 1999 they met again at Chennai, India and carried out an exhaustive exercise of reviewing and verifying the various figures in the account books and records of both the appellant and the respondent with the sole objective of reconciling the figures and determining the true amount due and payable by the respondent to the appellant.

[8] Agreement was reached at the second meeting held at Chennai on 16 April 1999 and the resulting amount found due and payable by the respondent to the appellant were set out and recorded in the document found from pp. 561-562 of appeal record (Jilid 2) (Bahagian C). This document and its contents (hereinafter referred to as the "Account Stated") was approved and signed by the Appellant's Senior Manager for Finance and Accounts and the Respondent's Group Accountant. These were the very persons who carried out the review and verification exercise at the meeting. This was "signed by the accountant" of the respondent and was duly admitted as such by the respondent, see para. 34 of the affidavit of Yong Ah Huat the Managing Director of the respondent deposed on 15 December 2000 where he said referring to para. 6 of the plaintiff's affidavit, "save as admit *(sic)* that the document was jointly signed by the Accountant for the defendant and plaintiff, the defendant denies the content of para. 6 of the plaintiff's affidavit".

[9] For the purpose of completeness para. 6 of the appellant's affidavit deposed on 17 November 2000 by V. Ramachandran s/p R. Veeraswamy, the Senior Manager (Secretarial & Legal) of the appellant said:

A On or about 16.04.1999, The Senior Manager for Finance and Accounts of the Plaintiff abovenamed and the Group Accountant of the Defendant abovenamed met and carried out an exhaustive exercise of verifying the various figures in the account books of both the plaintiff and the defendant with the sole view to reconciliate these figures and to determine the true amount due and payable by the defendant to the Plaintiff. This reconciliated amount was determined at RM2,494,907.02 being payable from the defendant to the Plaintiff and this was evidenced in writing in a document dated 16.04.1999 and signed by these Accountants of the parties hereto respectively.

[10] The minutes of meeting approved by both parties evidencing the above could be seen from pp. 693-699 of appeal record (Jilid 2) (Bahagian C). The signed statement at p. 727 of the appeal record (Jilid 2) (Bahagian C) shows the amount owed by the respondent as at 31 March 1999 was RM2,803,824.49. Similar figures also appear at p. 561 appeal record (Jilid 2) (Bahagian C).

Amount Prayed For In The Summary Judgment

[11] In the application by way of summons in chambers filed on 23 November 2000 the total amount prayed for at prayer (a) is RM2,494,907.02. This sum is much less than what was agreed to by the respondent in the account stated.

[12] The sum claimed is obtained by deducting the respondent's said part payment of RM107,497.90 described in the statement of claim at p. 25 appeal record Jilid 1 (Bahagian A dan B) from the total of RM2,911,277.50 due under the appellant's invoices described in the statement of claim at p. 24-25 appeal record Jilid 1 (Bahagian A dan B) and thereafter making a further deduction from the resulting amount on account of all the debit notes raised by the respondent at the second meeting on 16 April 1999 at Chennai, India as described in the statement of claim at p. 25, appeal record and evidenced in p. 562 appeal record, the total amount of which debit notes was RM308,872.58. This calculation is recorded in the account stated found at pp. 561-562 appeal record.

Law On Account Stated

[13] The law in respect of account stated is settled – see *Re Laycock v. Pickles & Anor* 4 B & S 497, an English case recorded on 13 November 1863.

[14] There, Blackburn J said at [506]:

> It may have been a great advantage to the defendants that there should be a settlement of the accounts, including many items, in the manner stated; and I think that the stating of account itself was a sufficient consideration to support this action. The question is, whether the balance can be recovered on a count upon an account stated. **An account stated is commonly called an admission of debt; but is merely evidence of it.** There is a real account stated, called in old law an *insimul computassent*, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts *in praesenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated … (emphasis added)

Respondent's Argument

[15] Learned counsel for the respondent argued that the appellant is not entitled to rely on the said minutes which the respondent admitted to have been duly signed by its representative. It was argued that the requirements for the doctrine of account stated have not been met. It was further alleged that the minutes as an Account Stated was a unilateral decision made by the appellant which cannot give rise to an Account Stated without the agreement of the other party. It was further submitted that the appellant's reliance on the doctrine of Account Stated is misconceived and without basis.

[16] It is our view that this cannot be any further from the truth. For the two orders of components made by the respondent to secure from the appellant in the form of various specification for making switchgears an amount of not less than RM9,763,750 was involved.

[17] Both parties tried to work out to reconcile their statement of account and this led to two meetings in Chennai, India. Both parties sent their appropriate representatives to hold discussions and they were able to reconcile their statement of account and came up with an agreed Account Stated. Despite that, the respondent chose not to pay when demanded to do so.

[18] To say that the appellant should be responsible for the alleged problem with TNB is a non-starter as firstly, there is no privity of contract between the appellant and TNB. Secondly, it was the respondent who not only supplied the goods directly to TNB but installed, tested and commissioned the switchgears at TNB's high voltage electricity transmission lines and or sub-stations. The appellant was never involved with such activities performed by the respondent.

[19] We have perused the details found in the Account Stated and we are satisfied that these were the Agreed Account Stated duly signed by the representatives of both parties. The averments of the respondent were inconsistent with contemporaneous documentary evidence of Account Stated. We are of the considered view that the Account Stated is binding on both parties.

[20] The parties were desirous of settling the matter and worked out the figures in India. Both parties signed the Account Stated and agreed between them as to the amount that was due and payable to the appellant from the respondent. This was a settlement of account and we feel that stating of account itself was a consideration to support this action.

[21] The question is, whether the parties after agreeing to settle the matter between them, can be permitted to resile and deny the very existence of evidence they have signed? We are unanimous that the argument of the respondent is misconceived and without any basis.

Decision Of The Learned High Court Judge

[22] The learned High Court Judge confirmed in his ruling that the respondent admitted that although they have received payments from TNB they have not paid the appellant when he stated in his judgment as follows: "Defendan mengakui tidak membuat bayaran kepada plaintif walaupun bayaran dibuat oleh TNB kepada defendan atas barangan yang dibekalkan oleh plaintif."

Privity Of Contract With TNB

[23] For the sake of completeness, TNB and the appellant have nothing to do with each other. There is no privity of contract between them. The respondent definitely has a contractual relationship with TNB. Admittedly the components to fabricate high voltage electric transmission switchgears were supplied by the appellant to the respondent but as admitted at paras 6-8 of the respondent at pp. 32-33 appeal record it was the respondent themselves who had processed and assembled the goods into switchgears prior to supplying, installing, testing and commissioning the switchgears for TNB.

Decision Of This Court

[24] In view of what had been discussed, this is a clear case where the respondent truly owed the appellant the sum claimed. There is strong evidence on Account Stated found in a document executed by the respondent confirming in no uncertain terms that as at 31 March 1999 as per books of account of the respondent that a sum of RM2,803,824.49 was due and payable by the respondent to the appellant. The respondent had received the payment from TNB and as such the appellant is entitled to full payment for goods sold and delivered.

[25] It is our view that this is a unique case in that although there is clear evidence that the parties have already agreed to reconcile the debt by having discussions over the matter and subsequently agreeing to a sum payable, yet the learned High Court Judge felt that summary judgment cannot be granted to the appellant.

[26] Sensitive to the uniqueness of the facts of this case, it is our unanimous decision to dismiss this appeal with no order as to costs and the deposit for this appeal to be refunded to the appellant on condition that the order of the High Court dated 18 February 2003 be substituted with:

> The Respondent is allowed to defend this action upon payment into the High Court within 30 days hereof a sum RM2,494,907.02 failing which final judgment shall be entered against the Respondent for the sum of RM2,494,907.02 together with interest thereon at a rate of 8% per annum from the date of final judgment to the date of realisation.